STATE OF MAINE
PUBLIC UTILITIES COMMISSION

June 25, 2004

ORDER FINALLY ADOPTING AMENDMENTS

PUBLIC UTILITIES COMMISSION
Underground Facility Damage Prevention Requirements (Chapter 895) Pursuant to P.L. 2003, Chapter 373

Docket No. 2003-671

PUBLIC UTILITIES COMMISSION
Underground Facility Damage Prevention Requirements (Chapter 895)

Docket Nos. 2003-672

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order we adopt changes from two rulemakings, both of which amend Chapter 895, the Underground Facility Damage Prevention Requirements Rule. First, in Docket No. 2003-671, a major substantive rulemaking, we incorporate Legislative changes made to our Provisionally Adopted Rule.[1] These amendments: 1) exempt excavators doing excavation associated with drinking water well construction from the requirement to call the Dig Safe System, Inc. when there are no member facilities in the municipality in which the excavation is planned, 2) facilitate the non-member notification process through development of a reference database, 3) increase the effectiveness of the 3-day waiver contained in 23 M.R.S.A. § 3360-A(G) by specifying the information operators must provide to the Dig Safe System beginning May 1, 2005, and 4) ensure the security of Maine facility location information provided to the Dig Safe System. Because we make no substantive changes to the amendments provisionally adopted in Docket No. 2003-671, or to the new provisions adopted by the Legislature, we discuss those changes only briefly in this Order.

We also adopt amendments developed in Docket No. 2003-672 (a routine technical rulemaking) that conform our rule to changes to the law protecting underground facilities made by P.L. 2001, ch. 577 and P.L. 2003, ch. 373 and improve and clarify the existing rule. Sections in this Order referring to Docket No. 2003-672 involving changes we adopt as routine technical rule amendments, we discuss in more detail.

[1] Resolve Regarding Legislative Review of Portion of Chapter 895, Underground Facility Damage Prevention Requirements, a Major Substantive Rule of the Public Utilities Commission, Resolves 2003, ch. 127 (effective April 9, 2004.)

II. BACKGROUND

The law protecting underground facilities requires that a damage prevention system exist in Maine to ensure that adequate safety precautions protect the public when excavation occurs near an underground facility. 23 M.R.S.A. § 3360-A. The statute establishes procedures that must be followed by excavators and underground facility operators when excavation occurs. These procedures, along with those governing the Commission's enforcement activities, are contained in Chapter 895 of our Rules, entitled "Underground Facilities Damage Prevention Requirements."

During the second session of the 120th Legislature, Maine's Legislature approved revisions to 23 M.R.S.A. § 3360-A.[2] The law was enacted as emergency legislation and therefore took effect when approved by the Governor on March 28, 2002.[3]

We issued separate Notices of Rulemaking in Docket Nos. 2003-671 and 2003-672 on October 7, 2003 and held a public hearing for each on November 6, 2003.

A. Docket No. 2003-671

On January 26, 2004, we issued our Order Provisionally Adopting Amendments to Chapter 895 in Docket No. 2003-671.[4] On March 8, 2004, the Utilities and Energy Committee voted unanimously to approve the Commission's amendments with certain revisions. The Governor approved, and the Resolve went into effect on April 9, 2004. Resolves 2003, ch. 127.

B. Docket No. 2003-672

The following persons commented on the proposed rule in Docket No. 2003-672 at the public hearing: Ike Goodwin, a well driller, on behalf of Goodwin Well & Water and the Maine Groundwater Association; John Butts, Executive Director for the Associated Constructors of Maine (Associated Constructors); Bob Finelli, Executive Director, Dig Safe System, Inc.; Stan Grover, Central Maine Power Company; Mark Levesque, On Target Locating Service; and Chris Wilber, Portland Natural Gas Transmission System (PNGTS). On December 3, 2003, we received written comments from Central Maine Power Company, Telephone Association of Maine, Maine Rural

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[2] An Act to Improve the Safety Provided by the Underground Facilities Protection Law, P.L. 2001, ch. 577.

[3] The Commission issued a Notice of Rulemaking on June 25, 2002 in Docket No. 2002-359 to incorporate the legislative changes but the rulemaking was not completed within the statutory timeframe. We opened Docket No. 2003-671, in part, to incorporate the March 28, 2002 statutory changes into Chapter 895.

[4] For a discussion of comments provided in that proceeding, see Docket No. 2003-671, Order Provisionally Adopting Amendments (Jan. 26, 2004).

Water Association, Portland Water Association, Associated Constructors of Maine, PNGTS Operating Company, and Northern Utilities, Inc. - Maine Division.

On January 27, 2004, we re-noticed this rulemaking for the purpose of obtaining additional comments from interested persons on newly proposed amendments to the rule (resulting from the comments received on the proposed rule) designed to address issues associated with the notification and treatment of abandoned facilities. We received additional written comments from Harry C. Crooker & Sons General Contractors and On Target Utility Services. We address various comments received in the description of rule changes below.

III. DISCUSSION OF AMENDMENTS

A. Editorial Changes

As a housekeeping matter, in our draft rule in Docket No. 2003-672, we proposed to amend some references to the Maine Revised Statutes Annotated so that they are consistent throughout the Chapter.

We also proposed in Docket No. 2003-672 to amend some cross-references to other sections and subsections within the Chapter so that they are consistent throughout. Any of the twelve main headings of the Chapter or a capital letter division of those headings is referred to as a “Section”. Any division below that of a capital letter is referred to as a “Subsection.”

Finally, in Docket No. 2003-672, we proposed to change reference in our rule to The Dig Safe System, Inc. from "Dig Safe" to "the Dig Safe System" in accordance with the practice and preference of that entity. The Dig Safe System, Inc., an independently owned not for profit corporation that operates the New England regional damage prevention system, currently carries out the underground safety system directed by law.

We received no comments in opposition to these changes and now adopt them.

B. Other Proposed Changes

1. Section 1: General Provisions

We proposed to modify Section 1(B) "Applicability" in Docket No. 2003-672 to reflect the elimination of architects and other designers of excavations established by P.L. 2001, ch. 577, section 4.

Notwithstanding its acceptance of this statutory change, On Target remains concerned that it is not an appropriate use of the Dig Safe system for architects, engineers and designers to call in project sites during the bid process (before

excavation is imminent) so that operators will mark the location of their facilities for use by prospective bidders. On Target seeks assurance that designers, architects and surveyors are not allowed to use the Dig Safe notification process for bidding purposes. We note that operators are required to respond to notification by the Dig Safe system within three business days to avoid delaying excavation. Because the markings needed by project planners are not urgent, designers' use of the Dig Safe notification for a non-excavation purpose puts additional pressure on operators who are required by law to respond to all requests for facilities marking within three business days. While we can understand the operators' objection to being held to the marking time limits contained in the Dig Safe law when the notification is not due to imminent excavation needs, we also understand that designers have resorted to use of the Dig Safe system to obtain information about the location of underground facilities on project sites because operators have not been responsive to their requests to provide such information.

It is unclear whether the use of the underground facilities damage prevention law for this purpose is appropriate. While excavation is the focus of damage intervention in the law, the law does not explicitly prohibit the use of the Dig Safe system at the earlier design and planning phase of a project. Further, identifying the location of underground facilities, as a project-planning tool, may avoid future damage to those facilities. Because On Target's concern (raised late in the rulemaking process in Docket No. 2003-672) was not the subject of invited comment in this rulemaking, we do not have a sufficient record to decide the issue. Consequently, we suggest that operators take steps to resolve this issue by establishing alternative procedures for designers, engineers and project planners to obtain the information they need in a timely manner so that they need not resort to use of the Dig Safe system for this purpose. We are not inclined to initiate a rulemaking on this point until operators demonstrate that they have put procedures into place that enable them to respond to designers' needs within a reasonable amount of time without a significant reduction in designers' calls to the Dig Safe System.

2. Section 2: Definitions

a. Changes Required by P.L. 2001, ch. 577

Having received no comments in opposition in Docket No. 2003-672, we make the following additions and modifications of Section 2 in accordance with P.L. 2001, ch. 577:

i. The definition of "excavation" appearing in Section 2(K) of the rule currently excludes the installation and maintenance of signs by the Department of Transportation. We strike this exclusion. P.L. 2001, ch. 577, section 1.

ii. We add as a new Section 2(S-2), the legislatively adopted definition for "shoulder-grading activity" as the use of equipment with a blade to remove material along a roadway shoulder for drainage purposes. P.L. 2001, ch. 577, section 2. We expect to interpret this as an exemption applying only to excavation

using horizontal scraping devices (i.e. blades) and not actual digging with a mechanical scoop or bucket. We invited comments regarding this interpretation. PWD supports our definition although it disagrees with the legislative decision to exempt shoulder-grading from the definition of excavation because its valve boxes, vital system valves that are frequently located in the shoulder areas, often are damaged by shoulder-grading activity.

We note, however, that the exemption establishes procedures for determining whether the depth of underground facilities in the area of shoulder-grading is sufficient to avoid damage. This exemption does not alter the basic requirements; an excavator engaging in shoulder-grading activity is still required to pre-mark and provide notice to operators with underground facilities in the excavation (shoulder-grading) area and operators are required to mark any facilities in the excavation area. If there are underground facilities in the shoulder-grading area that are at an insufficient depth to avoid damage, the law specifies that "prior to the shoulder-grading activity the licensing authority may require the owner or operator of the underground facility to lower or otherwise move its facility in accordance with applicable law and the terms of its license." 23 M.R.S.A. §3360-A (5-E)(D).[5] When the depth of PWD's facilities is insufficient to avoid damage during shoulder-grading activity, PWD could lower them even without a requirement by the municipality to do so.

iii. We modify the definition of “underground facility operator,” Section 2(U), to exclude an owner of underground facilities on its own property for commercial or residential purposes. P.L. 2001, ch. 577, section 3. PWD agrees with this change. We received no objections and adopt this modification.

b. Change Required by Resolves 2003, ch.127

We add, as Section 2(H-1), the legislatively adopted definition of "drinking water well construction," a term used in Subsection 4(B)(1)(a)(ii) which authorizes notification exemptions for excavators doing drinking water well construction. This amendment was considered in Docket No. 2003-671, our major substantive rulemaking.

c. Other Clarifying Changes

In Docket No. 2003-672, we proposed the following additional modifications to the definitions to clarify the existing rule:

i. Add a definition of “damage prevention incident” as Section 2(E-1). The definition is crafted to clarify when violations of the Dig Safe law or this rule should be reported to the Commission. The definition specifies that a damage

[5] Subsection 4(F)(3)(a) of the Rule also requires operators to mark their underground facilities in accordance with Section 6(B).

prevention incident is an occurrence in which one or more provisions of the Dig Safe law are violated, whether or not damage occurs. This term will replace the word "incident," which appears in the reporting requirements sections of the rule (Subsections 4(D)(2) and 6(C)(1)) and is used extensively in our enforcement forms and proceedings to mitigate possible confusion with the use of the term "incident" in other state and federal contexts.[6]

PNGTS commented that this definition "is so broad that the Commission may spend much of its time tracking down allegations that may never have risen to the level where an underground facility was potentially affected." It believes that this modification does not enhance public safety and should not be adopted. No other persons commented on this section.

We do not agree with PNGTS's view that this is unduly broad and we adopt the definition as proposed because the current definition creates confusion. We can revisit this if it is necessary in the future.

ii. Modify the definitions of "emergency" and "emergency excavation," Sections 2(I) and 2(J), to provide that in emergency situations excavation must commence within 12 hours of notice to the Dig Safe System and non-member operators, rather than immediately. We do so at the suggestion of operators, such as electric utilities, who frequently must repair utility poles damaged in accidents but prefer to do so in hours when the disruption in service is less noticeable for customers or the repair activity is less hazardous for workers, such as by avoiding peak traffic hours, when this is possible. The revised definition of "emergency excavation" allows excavation that is necessary to prevent injury, death or loss of an existing vital service (e.g. an emergency) to commence within 12 hours, rather than immediately, in appropriate situations. For example, this would allow operators to stabilize potentially hazardous situations that occur during nighttime accidents when called to the scene at night, but delay completion of the work, such as changing out weakened utility poles, until the next morning during daylight hours.[7]

We received numerous comments on several issues related to these amendments in Docket No. 2003-672 that we will discuss individually below.

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[6] Our utility accident reporting rule, Chapter 130, uses the term "serious accident" in designating when a utility must report to the Commission. Federal law refers to "incident" for gas utilities in an operational and maintenance regulatory context. "Damage prevention incident" should be sufficiently distinct to avoid confusion.

[7] CMP notes that the opposite circumstance is also possible, when damage occurs during daytime hours but repair work takes place at night.

A) Twelve Hours to Start Emergency Excavation

CMP supports allowing 12 hours for excavation to commence because it would be helpful to electric utilities, who must sometimes repair damage from accidents but prefer to do so, if possible, when it will cause the least disruption to customers, such as at night. TAM supports expanding the time within which emergency excavation may begin because it considers a temporary loss of the provision of its services to be unlikely to cause serious harm.

Initially, the Dig Safe System disagreed with adding a 12-hour emergency time period because its members believed that doing so would cause an increase in abuse of the emergency notification clause. After further discussion at the hearing, to eliminate confusion, the Dig Safe System requested that we make it clear that the rule requires emergency excavation to begin within 12 hours of notification, but it does not require emergency excavation to be completed within 12 hours. Associated Constructors also expressed confusion as to whether excavators would be required to wait 12 hours to commence excavation so that operators have 12 hours in which to mark underground facilities in the area of the emergency excavation prior to excavation.

Consequently, we add clarifying language to the definitions of emergency and emergency excavation to clarify that an emergency excavation may begin within 12 hours, rather than immediately. These definitions do not require excavators to wait 12 hours to begin excavation and do not provide a 12-hour marking "window" for operators prior to excavation. Operators are still obligated to mark "as soon as practicable" after receiving notification, as required by Section 6(B)(2)(c) of the Rule.

B) What is an Emergency or an Emergency Excavation?

Harry C. Crooker asks whether there will be definitions of what "exactly or generally" constitutes an emergency excavation or a serious damage incident under the rule. CMP requests that we provide examples of emergencies and non-emergencies in order to put excavators on notice as to what would constitute a violation of the rule.

We have attempted to draft definitions of "emergency" and "emergency excavation" that are as specific as possible yet flexible enough to cover all applicable circumstances as Subsections 2 (J) and (S-1). PWD supports our modifications of the definitions of "emergency" and "emergency excavation." Operators and excavators will need to apply these definitions to real life circumstances using their best judgment. It would be impossible to provide examples of every sort of emergency situation and we would risk mis-readings, legal challenges, and misunderstandings, should we attempt to do so. However, the following discussion may help identify the types of circumstances that are unlikely to constitute valid emergencies. The definition states that only those circumstances in which it is necessary to begin excavation within

12 hours to prevent injury, death or loss of property or of an existing vital service, such as electric, telephone or water service, constitute emergencies. In our Notice, we provided the example of a utility pole broken by a car accident creating a circumstance in which the pole will need to be replaced within a matter of hours in a process that requires excavation. It is acceptable (assuming service were not already cut by the event of the accident) for an electric utility to stabilize the pole initially but to wait a few hours until off-peak electric usage or perhaps low traffic hours to cut service and make the necessary full repair. By contrast, "scheduling urgency" where an excavator realizes it is ready to excavate but has not yet given the necessary notifications to the Dig Safe System is not a valid reason to use the emergency excavation notification procedures. As a general rule, unanticipated excavation necessary to address an emergency situation is more likely to constitute an emergency because of the public health and safety risks, than are situations in which work efficiency or construction costs for an anticipated excavation project are at issue.

C) Call Center Dispatch of Emergency Excavations

On Target asks whether the call center will ask for the start time of the emergency excavation "or dispatch it as an immediate start time as most are dispatched now." It seems sensible that it would be helpful to other operators with facilities in the excavation area for the entity calling in the emergency to specify the excavation start time, because such specification would designate a timeframe within which they need to mark. Doing so might allow them to mark their facilities prior to the onset of excavation during regular work hours rather than in the middle of the night. We would suggest that operators provide the excavation start time, if known, to the call center operator so that the call center can indicate this in notifications. Based on On Target's comment, it appears this may already occur to some extent. We trust that the operators can work with the Dig Safe system to develop a workable means of handling emergency excavation notifications.

The rule currently states that operators must mark "as soon as practicable" after being given notice of an emergency excavation. We view this language as allowing for operator and excavator agreement or coordination around the start time for excavation within the 12 hours that are allowed under our definition of an emergency excavation.

D) No Duplicate Notification of Emergency Excavations

On Target also asked whether the excavator, after calling in an emergency excavation to the Dig Safe System, must also notify member operators of the intended excavation. If so, On Target notes that this would defeat the purpose of the one call system.

This amendment is not intended to require additional notifications by excavators beyond those that currently exist in the law. Excavators are required to notify non-member operators and the Dig Safe System of the emergency

excavation as currently required in the law. We adopt this amendment to specify that the excavator should also indicate that the notification, whether to the Dig Safe System or non-member operators, is for an emergency excavation.

E) Monitoring Misuse of Emergency Notifications

TAM notes that misuse of emergency notification procedures should be curtailed because false emergency notifications tie up operators' resources, possibly making them unavailable in the event of a true emergency excavation situation. On Target asks how misuse of the emergency excavation notification will be monitored. CMP supports including an explicit statement in the rule to forewarn excavators that they can be penalized for misuse of the emergency notification process and notes that review of the Dig Safe System records will readily show which excavators misuse this provision.

We will learn of misuse of the emergency provisions from damage prevention incident reports submitted by operators and excavators. Misuse should be reported to us for appropriate action under our authority to find a violation and assess an administrative penalty for failure to give proper notification as required by law. 23 M.R.S.A. §3360-A (6-C).

F) Penalty for Misuse of Emergency Notifications

Harry C. Crooker asks what the penalty will be for situations where the emergency excavation provision of the rule is misused. Punishment for misusing the emergency notification provision (i.e. violation of the required notice provisions) will be the same as for other violations of the rule for which penalties may be imposed. The potential administrative penalties are set out in Section 8(E) of the Rule, reflecting the statutory allowances in 23 M.R.S.A. § 3360-A (6-C).

iii. Add a definition of a "serious damage prevention incident" as Section 2(S-1) in conjunction with our proposal to add a requirement to Subsection 6(C)(1) that operators provide immediate notice to the Commission in certain circumstances. Immediate notification will ensure that the Commission is aware of serious events relating to excavation around underground facilities when they occur to enable us to respond to inquiries, and will also allow it to send an investigator to the site should it be warranted.

We received no comments on the definition we proposed. However, CMP suggests that a change in procedure be made whereby operators inform the Commission's damage prevention investigators immediately in any instance in which damage to an underground facility occurs so that an investigator can meet on-site right away, perhaps the next day, with the excavator and operator to view the scene of the incident and discuss the matter while it is fresh in everyone's memory. CMP notes that it can be difficult to recall and explain the circumstances of incidents that occurred many months ago.

While CMP's suggested site visitation procedure might help to determine the facts of an incident while they are fresh, we currently do not have the resources to adopt this addition to our process to the extent CMP suggests. We are already employing CMP's suggestion in situations in which it appears warranted, namely those where the damage or injury (or risk thereof) is particularly pronounced. Our experience with site visits to date is that it is very time-consuming for our investigators to travel to the scene of a hit. With approximately 400 incidents reported annually, implementing CMP's proposal would require additional funds beyond those we currently collect in assessments to utilities. We doubt that utilities would welcome supporting these additional costs. Moreover, the lost productivity time (and therefore increased damages) for excavators and operators who must wait for our Inspector to arrive would be substantial. To the extent site visits can provide a way for our investigators to reduce or eliminate time-consuming fact finding efforts and technical conferences that currently are done later in the process with many of the same individuals that would be present at the site visit, we will continue to explore this use of our resources. However, we do not presently expect that the efficiencies exceed the added costs (including productivity losses) and do not adopt CMP's suggestion.

3. Section 3: Responsibilities of the Designer

In Docket No. 2003-672, we proposed to repeal Section 3 in accordance with P.L. 2001, ch. 577, section 4. We adopt this change but note the additional comments that were made regarding prudent use of location information in project planning and design.

Northern Utilities commented that even though the Legislature repealed the statutory obligation for design planners to make information regarding the nature and location of all affected underground facilities part of their project plan, it believes that a prudent architect, engineer or designer would preliminarily investigate the location of underground facilities in their project planning and notate them in the plan. In addition, Northern suggests that as a cross-check, an excavator should inquire of the party requiring excavation whether the plans to be used reflect any background research as to the location of underground facilities. Northern concludes that if a plan includes such notations, the excavator would have some notice of underground facilities in the area. Northern proposes that rule language along these lines would improve communication and enhance safety. We will consider Northern's suggestions the next time we revise this rule, including the question of whether we have authority to do so under the present law. However, we are not comfortable adopting this suggestion at the present time without further research and the opportunity to obtain other stakeholders' comments on this matter. An alternative course would be for Northern to make its proposal to the Legislature next session.

4. Section 4: Responsibilities of the Excavator

a. Section 4(A) Pre-mark; Excavators to initial

To improve the marking process, in Docket No. 2003-672, we proposed to modify Section 4(A), "Pre-marking," to require the excavator to include its initials in its pre-mark and, in instances where the excavator uses a single stake or other single point indicator, to indicate the radius of the excavation area. These procedures will help operators identify the correct work site when marking. By placing its initials on the pre-mark, the excavator will provide operators with information that helps to confirm that the designated excavation area matches that indicated on the Dig Safe ticket. While not required, excavators could also consider indicating their phone number or Dig Safe ticket number with their initials to provide even more confirming or contact information to assist operators.

Northern Utilities supported having excavators initial the pre-marked excavation area, stating its belief that it will reduce the possibility of error, enhancing safety. PNGTS and PWD concurred with the requirement for the excavator to indicate a radius of the excavation when using a single stake pre-mark. We adopt both of these amendments.

b. Subsection 4(B)(1)(a) Exceptions to notice process; Excavators should advise if emergency excavation

In Docket No. 2003-672, we proposed to modify Subsection 4(B)(1)(a) in two ways. The first is to clarify that there are two exceptions to the notice process delineated in this subsection: emergency notifications pursuant to Section 4(C) and waiver of the waiting period when no facilities exist in the excavation area as established in P.L. 2003, ch. 373, codified at 23 M.R.S.A. § 3360-A (3)(A) and (3)(G). The second is to require excavators to specify when they notify operators with underground facilities within the area of an emergency excavation that they are making an emergency notification. We propose this improvement to the notification process to help ensure that emergency excavation notifications are not misunderstood as normal excavation notifications.

We received no comments on the first amendment clarifying the exceptions to the normal notice process and adopt it as proposed. We received contrasting comments on whether to require excavators to indicate when they notify the Dig Safe System and non-members whether the excavation is an emergency excavation. PWD supports this provision. CMP believes that it is not necessary because the existing process already addresses it. Mr. Finelli confirmed that the Dig Safe System call center routinely asks the excavator if it is an emergency situation. We note, however, that excavators also must contact non-member operators who may not make the same inquiry as the Dig Safe System. Consequently, we will adopt this amendment to ensure that excavators provide this information in every notification of an emergency excavation.

c. Subsection 4(B)(1)(a)(i) Waiver of 3-day waiting period if no facilities in area

We have inserted Subsection 4(B)(1)(a)(i) to include the 2003 Act's waiver of the 3-day waiting period when excavators have made all required notifications and are informed that no underground facilities exist in the proposed excavation area. P.L. 2003, ch. 373, codified at 23 M.R.S.A. § 3360-A (3)(A) and (3)(G). This provision of the Rule was provisionally adopted in Docket No. 2003-671 and is unchanged after review by the Legislative Utilities and Energy Committee in the major substantive rulemaking process. We finally adopt it here.

d. Subsection 4(B)(1)(a)(ii) PUC reference database

We insert this legislatively adopted provision from Docket No. 2003-671 to establish that we will develop and maintain a database for use by excavators doing drinking water well construction to allow them to determine whether they must call the Dig Safe System and which non-member operators they must contact before beginning excavation in a municipality. This provision takes effect May 1, 2005 pursuant to Resolves 2003, ch. 127.

e. Subsection 4(B)(3) Excavator responsible for notifications

In Docket No. 2003-672, we proposed to insert Subsection 4(B)(3) using the language contained in P.L. 2001, ch. 577, section 5, which makes explicit the duty of the excavator directly responsible for performing the excavation to ascertain that all required notifications have been made. PWD supports this provision. Associated Constructors expressed concern that the duty of the excavator to ascertain that "all required notifications" have been made might require the excavator to recheck with every potential utility once the 3-day period has passed to see if they have underground facilities in the excavation area but have not marked them. Associated Constructors stated that excavators believe their notification responsibility is satisfied once they have notified the Dig Safe System and non-member operators.

We agree with the views put forth by Associated Constructors. We understand the Legislative Committee's intent in modifying the law is to simply require the excavator to ascertain that a Dig Safe ticket has been obtained for the excavation and that someone has notified non-member operators as required by the law, not to confirm that operators who have not marked actually have no facilities in the excavation area.

f. Subsection 4(C)(1) Make explicit violation for misuse of emergency notice provision

Because operators report that abuses of the emergency excavation notification procedures occur with some regularity by excavators who do not

wish to wait for the normal marking period to expire, in Docket No. 2003-672 we considered modifying Subsection 4(C)(1) to make clear that misuse of the emergency excavation provision in situations that are not emergencies as defined in this rule will be punishable under Subsection 4(B)(1)(a). Such misuse unfairly burdens operators who must make an extra effort to accommodate emergency excavations and still meet the deadline under the law for marking all properly noticed excavation areas. We concluded that it is not necessary to make misuse of the emergency notification provision a separate violation of the rule, since the rule already reaches this conduct. Misuse of the emergency excavation notification exemption in the law constitutes a failure to properly notify operators under Subsection 4(B)(1)(a) and is therefore a punishable violation under the Damage Prevention law, 23 M.R.S.A. §3360-A (6-C)(A).

CMP agrees that Section 3360-A (6-C)(A) provides us with authority to penalize excavators who notify operators of an emergency when an emergency does not exist. However, CMP disagrees with our conclusion, stated in the Notice of Rulemaking, that it is not necessary to make this a separate violation because the rule already reaches this result. CMP encourages us to "spell out" that it is a violation of the notice provisions under the law if they misuse the emergency notification provision and urges the Commission to pursue such violators.

We remain unpersuaded that an explicit statement of this matter in the rule is necessary. We make our view clear in this Order and can educate excavators about this in our training sessions.

g. Subsections 4(C)(2), 4(C)(4) and 4(D)(1)

In our renoticed rule in Docket No. 2003-672, we also proposed to modify excavator requirements by adding Section 4(C)(4) and by adding text to Subsection 4(D)(1) to require excavators to treat the facility as live and to contact the operator for confirmation as to whether the exposed facility is active or inactive.[8] We added text to Subsection 4(C)(2) to make clear that an excavator must employ reasonable precautions to avoid damage to underground facilities when excavating after they have been exposed, until the operator of the facilities has positively identified the facilities as inactive and has indicated that there is no need to protect them from damage.[9] This will ensure that excavators do not harm themselves or damage live underground facilities that they erroneously assume are abandoned, when the facilities are unmarked.

[8] Excavators should contact the operator directly, not the Dig Safe System.

[9] Corresponding operator provisions are discussed in Subsection 6(F)(1), 6(F)(2), and 6(F)(3).

We received no comments on the revised provisions regarding the handling of abandoned underground facilities.[10] We find the revised proposal sound and comprehensive with regard to requiring that both operators and excavators treat abandoned facilities with the care that would be accorded to live facilities until they are confirmed to be inactive, and we adopt them. We expect that this will enhance safety in situations where abandoned and unmarked live facilities might be confused.

h. Section 4(D)(2) Reportable Damage Prevention Incidents

In Docket No. 2003-672, we proposed to modify Section 4(D)(2) "Report to Commission" to clarify when excavators must file Underground Facility Damage Prevention Incident Reports with the Commission. Excavators and operators had expressed confusion with the previous language of this section, which required an excavator to both directly observe a suspected violation of the rule and make a judgment that the suspected violation poses a clear threat to an underground facility or results in damage to the facility. We proposed to omit the qualifying and judgmental aspects of the requirement that tend to distract from the core issue of whether a suspected violation has occurred. The amended provision is more consistent with uniform enforcement of the damage prevention law. We also updated the Commission website address and made clarifying or editorial changes to this provision, such as using the revised term "Damage Prevention incident" as proposed in this rulemaking.

MRWA states that the proposed language is easier to understand. However, MRWA reiterated its view, expressed in prior rulemakings, that the underlying concept of requiring operators and excavators to report on each other is flawed and should be corrected. In addition, MRWA states that “the ‘one-size-fits-all’ nature of the reporting requirements of sections 4(D)(2) and 6(C)(1) fails to distinguish between different types of violations, different types of excavators and different types of operators.”[11] MRWA expressed a willingness to make a more specific proposal for ways to improve both of these sections either in this rulemaking or the next time we consider changes to Chapter 895. We welcomed such suggestions during our “pre-rulemaking” phase when we solicited proposals for improvements to Chapter 895. Unfortunately, the rulemaking process does not allow a sufficient opportunity at this point in the proceeding to consider these issues in full. We will, however, bear MRWA's offer in mind when we prepare for our next Dig Safe rulemaking.

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[10] Though renoticed for revisions to the abandoned facilities notification procedures, we received written comments from On Target and Harry C. Crooker & Sons, Inc. on provisions of the renoticed rule that had not been revised. These comments have been addressed in the relevant sections of this Order.

[11] Subsections 4(D)(2) and 6(C)(1) are parallel provisions establishing identical circumstances when excavators and operators must report to the Commission. Consequently, we discuss them both here.

CMP, TAM, and PNGTS expressed concern about requiring excavators to report “suspected” violations of the damage prevention law. These commenters all believe that the word “suspected” is not an objective measure and leads to a greater degree of uncertainty as to what activity they are supposed to report. TAM believes this could result in over-reporting by excavation participants out of fear that someone else may “suspect”, and then report, a violation, thereby leaving the party that did not suspect or report a violation in violation for non-reporting. TAM argues that sections 4(D)(2) and 6(C)(1) should not be changed.

PWD expressed concern that under the current definition operators could be cited for failing to report threats to underground facilities or near misses of which only the excavator present at excavation would be aware.

CMP proposes to delete the word “suspected” from our proposed definition, and suggests instead requiring an excavator involved in an excavation to report any Damage Prevention Incidents as defined in Section 2(E-1), "where the excavator has substantial reason to believe that a Damage Prevention Incident has occurred."

We will delete the word “suspected” from Sections 4(D)(2) and 6(C)(1), replacing it with language similar to that CMP has suggested. An excavator or operator should report when it has reason to believe that a Damage Prevention Incident [i.e. a violation of the Dig Safe law] has occurred, whether or not there is damage to underground facilities. We do not adopt CMP's proposal to require that the operator or excavator have "substantial" reason to believe because this injects a higher standard and another point of debate into the process that seems unnecessary for the purposes of reporting damage prevention incidents.

i. Section 4(F) Exemptions for cemetery activities and shoulder-grading

In Docket No. 2003-672, we proposed to amend Section 4(F) by including an exemption to the excavator notification requirements for cemetery activities and an exemption from the safety zone requirements for shoulder-grading provided that the excavators performing such activities follow certain procedures as required in P.L. 2001, ch. 577, section 8. We have deviated from the language of the P.L. 2001, ch. 577 in the first sentence of Subsection 4(F)(3) by putting “is” in the place of “may be” because we believe it is more consistent with the logic and intent of the provision.

We received no comments on this amendment and adopt it.

5. Section 5: Responsibilities of the Dig Safe System

We have added legislatively adopted Subsection 5(8), as required in Resolves 2003, ch. 127, the Legislative action on our major substantive rulemaking (Docket No. 2003-671), to establish that the Dig Safe System will assist the Commission in coordinating access for Maine excavators who use the MPUC's reference database. We also add legislatively adopted Subsection 5(9) to specify the manner in which the Dig Safe System must restrict access to Maine facility location information and to maintain such information in a secure manner. We have inserted the language of this provision of the rule as modified by the Maine Legislature, with minor formatting changes. It provides that the Dig Safe System shall limit use of facility location information provided by Maine operators to those with damage prevention duties, limit access to facility location information to necessary employees of the Dig Safe System and not to the general public, require use by the Dig Safe System of reasonable care to keep facility location information provided by Maine operators secure, and allow the MPUC to initiate an investigation to review security protocols used by the Dig Safe System.

6. Section 6: Responsibilities of the Operator

a. Subsection 6(A)(1)(d)

We insert Subsection 6(A)(1)(d), a provision that specifies the means by which each member operator shall identify and report the location of its underground facilities to the Dig Safe System. Our provisionally adopted language, developed in Docket No. 2003-671, was modified by the Legislature with the enactment of Resolve 2003, ch. 127. We insert the Legislature's language into our Rule largely unchanged except for format. This subsection provides the degree of accuracy with which member operators must provide facility location information to the Dig Safe System. The Legislative changes to our provisionally adopted rule include: 1) an exemption for telephone utilities from providing the Dig Safe System with the location of service drops from a main line to customer premises;[12] 2) Commission waiver for any water utility transmission mains that are downstream of a treatment plant or underground water source, to allow the water utility to provide the Dig Safe System with an alternative method of facility location specification, such as a corridor, for notification purposes; and 3) delayed effective date until May 1, 2005 for Sections 4(B)(1)(a)(ii), 6(A)(1)(d) and 7(A-1).

[12] Facility repair costs and outage damages for unmarked telephone service lines will be the responsibility of the operator. 23 M.R.S.A. § 3360-A (6) and Ch. 895, Section 6(E).

b. Subsection 6(B)(1) Marking gas and electric facilities in the public way

In Docket No. 2003-672, we proposed to amend Subsection 6(B)(1), reflecting P.L. 2001, ch. 577, section 6, to make operators of underground facilities responsible for marking, in addition to their own facilities, all underground facilities used for furnishing gas and electric service that are connected to the operator's facilities located in a public way and known to the operator.

From our participation before the Legislative Utilities and Energy Committee which crafted this provision, it is our understanding that it intended to enhance safety for unsuspecting excavators by requiring electric and gas utility operators to mark **private** facilities connected to their facilities when located in the public right of way because private owners of underground facilities often cannot easily locate and mark their facilities. In fact, this amendment was proposed by the Maine Department of Transportation (MDOT) and adopted substantially as proposed, with the limitation to electric and gas utilities. MDOT's written testimony to the Utilities and Energy Committee clearly indicates that it was concerned with privately owned utility services located in the public way.[13] We note that the language of this provision of the law does not make a "private facility" distinction and is, therefore, not consistent with our understanding of the legislative intent. We expect to seek clarification that our interpretation is consistent with the Legislature's intent during the next session. In the meantime, we offer below an interpretation to guide operators in the application of this provision.

The Committee recognized that gas and electric utilities have records indicating where the private facilities connect to their facilities in the public way, the expertise to easily observe signs of such adjoining facilities, and the equipment and the technical ability to carry out the necessary location and marking within the public way while they are engaged in marking their own facilities. The Legislature also

[13] MDOT's testimony of February 21, 2002 cited the following reasons in support of this amendment:

- Some utilities have claimed that services need not be marked by the utility [because] such services are privately owned.
- Private landowners rarely recognize services located in the public way as being owned by them, and even if they do, they do not have the technical expertise to locate the service.
- As a result, some services are not being marked. It is not uncommon for these services to be hit during excavation causing delays, cost and obvious safety concerns.
-

singled out gas and electric facilities in this provision because of the heightened safety hazard associated with these facilities.

Northern requests that this provision make clear that operators are not responsible to mark gas facilities that may be unknown to it. Northern explains that it does not have information regarding private gas facilities, such as master meter facilities, and therefore could not locate such facilities.[14]

The law states that operators must mark additional gas and electric facilities in the public way that are connected to the operator's facilities and known to the operator. Northern suggests that it will not have detailed knowledge of the course that private underground facilities take from their connection to Northern's facilities and, therefore, the private facilities are not sufficiently "known" for it to mark them. We read the statute to require marking if the electric or gas utility is aware of the existence of the private facility connected to its facility in the public way, whether or not it has knowledge of the exact location of the private facility. The Legislature did not craft the law to state that gas and electric utilities only have the obligation to mark private facilities within the public way if the gas or electric utility has sufficient records or other direct knowledge of the location of the private facilities. To read it in this way would render the statute virtually meaningless. Rather, the only logical reading is that the Legislature expected that gas and electric utility operators would have a sufficient awareness as to where private facilities extend from their facilities within the public way, as well as sufficient technological means to locate the private facilities extending from their own, that it included the directive in the law that gas and electric utilities should mark the private facilities. While the gas or electric utility may not have maps showing the entire private facility, we expect it to take steps to determine the location using its knowledge of the private facility's connection point with the utility facility, observable meter or service drop installations on a building should facilitate location of the private facility, or other means. Failure to do so could be found to be an unreasonable utility practice as well as a violation of the Dig Safe law. Electric utilities can also induce a tone on the private facility that would assist it in locating and marking the private facility in the public way. Our expectation that gas and electric utilities will have adequate information and expertise to mark private facilities in the public way is consistent with the Legislative intent that gas and electric operators expand their locating and marking efforts to encompass private facilities within the public way. The Legislature envisioned that this would assist in protecting excavators from location omissions for hazardous facilities and assist private facility owners, which typically do not have the expertise of the utilities in facility location and marking, particularly in the public way, and would advance underground facility damage protection and overall public health and safety.

In our enforcement activity, we will examine the circumstances to determine whether an operator was negligent or reckless in its efforts

[14] Northern has previously informed the MPUC that there are no master meters on its system in Maine. Accordingly, we do not anticipate that Northern will encounter these facilities in the public way in its territory.

to mark the proximate private facilities in the public way. We will consider the explanations of operators that have not accurately marked adjoining private facilities before concluding whether a violation has occurred. We recognize that the operator's knowledge of such private facilities will likely be less complete than its knowledge of its own facilities and will take that into account in any enforcement activities.

We do not interpret the law -- although it could be read in this manner – to require gas and electric operators to mark other gas and electric utility or municipal operators' facilities. In our view, to interpret the law in this manner would create confusion and perhaps have an adverse affect on safety. For instance, such an interpretation would mean that the first gas or electric utility to arrive at the pre-marked area would be required to mark all gas or electric facilities within the public way, even when those facilities belong to a utility or a municipality that may be on its way, armed with company records, to mark them itself. It seems to us that circumstances where one utility must mark for another without benefit of the utility records could lead to confusion and could increase the likelihood of avoidable mis-marking. We believe the Legislature did not intend this.

On Target expressed concern that this provision could make gas and electric utility operators responsible for marking municipal facilities, such as street lights and traffic control loops, which are frequently located in the public way. On Target asks whether this provision excuses municipalities from marking their facilities. It does not.[15] Municipalities, and all other operators, remain responsible for marking their facilities in the public way as well as on private land. Of course, this does not prohibit municipalities from arranging with an electric utility or a locating service for marking services (presumably for suitable compensation) should both entities agree to such an arrangement.

b. Subsection 6(B)(1), 6(F)(1), 6(F)(2), and 6(F)(3) Abandoned facilities notification and confirmation

In Docket No. 2003-672, we initially proposed in Subsection 6(B)(1) that operators should mark any abandoned or inactive facilities as required by new Section 6(F) or, if the operator determines that there are no facilities in the excavation area that it is obligated to mark, it should inform the excavator in writing prior to the expiration of the excavator's waiting period. Written notice could take the form of

[15] A broad reading of the current provision would make each gas and electric operator responsible for marking all other gas or electric facilities within the public way, as well as its own. Under this interpretation, a municipality which had an electric line in the public way feeding street lights or a traffic signal would be equally responsible for marking the electric utility's facilities. However, as noted above, this result would be untenable from a public safety point of view. Consequently, we interpret the provision to require each operator to mark its own facilities and for them to also mark private electric and gas facilities connected to their system and located in the public way.

electronic facsimile, e-mail, or marks made at the excavation site. The hearing and initial comments revealed broad opposition to the proposal to mark abandoned facilities due to the difficulties of doing so and questions of legislative intent. Accordingly, we renoticed Docket No. 2003-672 to receive additional comments on a revised proposal regarding notification and treatment of abandoned facilities.[16]

In the revised rule in Docket No. 2003-672, we proposed not to require operators to mark abandoned or inactive facilities in the excavation area, but to advise the excavator that abandoned or inactive facilities may exist within the excavation area and to caution the excavator to treat any line exposed during excavation as active until the operator has confirmed by visiting the site that the exposed facility is inactive. We proposed modifications of Subsections 6(B)(1), 6(F)(1), 6(F)(2), and 6(F)(3) of the operator's requirements to accomplish these objectives.[17] We received no comments on the revised provisions regarding the handling of abandoned underground facilities. We find the revised proposal sound and comprehensive with regard to requiring that both operators and excavators treat abandoned facilities with the care that would be accorded to live facilities until they are confirmed to be inactive, and we adopt them. We expect that this will enhance safety in situations where abandoned and unmarked live facilities might be confused.

c. Subsection 6(B)(4)(a) Operator marking specifications

i. Marking 10 feet beyond pre-marked area

In Docket No. 2003-672, we proposed to amend Subsection 6(B)(4)(a) to require operators to mark the location of underground facilities at least 10 feet beyond the boundaries of the proposed excavation area and to mark facility locations at intervals of no more than 25 feet. We proposed this to provide additional protection to underground facilities proximate to the excavation area in the event that excavation activities remove the facility location markings. We posited that the additional marking would also help ensure that excavators are aware of facility locations even when excavation approaches the outer boundaries of the pre-marked area or obscures markings. Marking at intervals of no more than 25 feet will help ensure that visual continuity is maintained, avoiding confusion about the location of the facilities. Some operators have indicated that they routinely take such measures.

The Dig Safe System agreed with our proposal to have operators mark facilities beyond the excavation area but requested that we adopt a 15-foot buffer, rather than ten, to be consistent with Massachusetts' law. Because the Dig Safe System works in five states, it supports unified regulations where possible. It

[16] CMP, PNGTS, PWD and TAM commented in opposition to, or with concerns about their ability to satisfy, the requirement to mark abandoned facilities.

[17] Corresponding excavator requirements in Subsections 4(C)(2), 4(C)(4) and 4(D)(1) are discussed above.

states that a 15-foot requirement would help eliminate confusion in training and educational efforts for excavators and member operators that work in both states. The Dig Safe System also states that including the expanded marking area will give excavators the freedom to dig an additional five feet beyond the pre-marked area without having to request another utility locate.

PNGTS believes the need to mark facilities beyond the pre-mark area is well-founded and concurs with the requirement. PWD opposes requiring operators to locate facilities an additional 10 feet outside the pre-mark area because it is "time-consuming, ineffectual, and adds little to the protection of facilities," particularly in "highly urbanized, heavily trafficked areas." For a utility such as PWD, which performs over 7,000 locates a year with limited resources, this provision would add nearly 3 miles of additional locating. PWD notes that excavators have great latitude in establishing the excavation area and many already expand the zone "beyond the bounds of practicality." PWD notes that excavators are responsible for maintaining marks by the use of offsets, and can call for a remark if necessary.

On balance, we agree with PWD and do not adopt the modification to require operators to mark an additional area outside the boundaries of the pre-mark area. Excavators can designate a pre-mark area that accommodates the excavation needs without adding a provision to the rule for all to follow that disadvantages certain operators such as those whose facilities are located in urban areas.

ii. Marking intervals no greater than 25 feet

PNGTS believes that 25 feet is not an appropriate interval for marking long, straight stretches. We think that 25 feet is a reasonable maximum marking interval for most instances, although PNGTS may be correct that it is a smaller interval than might be necessary in some situations. On balance, we expect those instances to be far fewer than those in which adhering to the 25 foot interval will be critical for a clear view of the location of the underground facilities. (We note that 25 feet is a maximum interval. If a smaller interval is necessary operators should employ it.) We proposed this interval in Docket No. 2003-672, in part, because of instances in which damage occurred because the marking intervals were too widely spaced. We prefer to err on the side of caution in this requirement and adopt 25 feet as the maximum marking interval.

d. Subsection 6(B)(4)(b) Tolerance zone for non-member operators and depth

In Docket No. 2003-672, we proposed to insert two provisions in Subsection 6(B)(4)(b), "Tolerance zone," that exist in the law but appear to have been inadvertently omitted from the original rule.

i. Depth of facility

The first provision requires the operator to indicate the depth of the underground facility, if known, when marking. 23 M.R.S.A. § 3360-A (4). We have heard from operators that it can be difficult to know the depth of their facilities, due to changes unknown to the operator in the depth of soil above the facility from human activity and erosion. However, the law requires operators to provide this information to excavators when possible, evidently intending that operators should communicate complete knowledge of the location of their facilities to excavators.

Associated Constructors enthusiastically agrees with the requirement that operators indicate to excavators the depth of the facility if known while PNGTS and PWD object to it due to the difficulties it presents for operators. PNGTS states that the only way to "know" the actual depth of a facility is to visually inspect it immediately prior to excavation (presumably by means of a test hole.) PWD believes that the determination of facility depth is at best an approximation and at worst a guess and that there should be no statutory responsibility to designate depth.

We note that the statute requires a designation "if known." Facility installations will vary in age. Operators must make an assessment as to whether they believe the depth is "known" to comply with this provision of law. We are unable to override the statute in this rulemaking. Nevertheless, we will take the difficulties of this requirement into consideration when enforcing the rule. Operators who object to this provision of law may ask the Legislature to change it.

ii. Non-member tolerance zone

The second insertion we proposed in Docket No. 2003-672 establishes that non-member operators are allowed a tolerance zone of 36, rather than 18, inches from the exterior sides of the facilities. 23 M.R.S.A. §3360-A (10)(B). In most other respects, the damage prevention notice and marking procedures for members and non-members are identical. This difference was overlooked in our initial rulemaking.

MRWA supports this amendment and appreciates that its members are allowed the larger tolerance zone as “further recognition by the Legislature and the Commission that water and wastewater systems should be treated differently due to size and capabilities.” MRWA points out that the rule will be more internally consistent if the 36 inch tolerance is noted also in Subsections 6(B)(4)(c)(1) and (2) and we agree with this editorial note.

PWD, Associated Constructors, and PNGTS oppose having different tolerance zones applicable to different entities determined simply on whether they are members or non-members of the Dig Safe System. They observe that such differing standards create confusion and impose substantial burdens in the field. It

also creates a disincentive to join the Dig Safe System because non-members are allowed a tolerance zone that is twice as large as members are allowed.

We agree with the reasons these commenters cite as to why having a dual standard for members and non-member operators is undesirable. However, we have no choice but to reflect the law as it currently exists.

e. Subsection 6(C)(1) Reportable Damage Prevention Incidents

In Docket No. 2003-672, we proposed to amend Subsection 6(C)(1) "Report to Commission" in the same manner as Subsection 4(D)(2) governing excavator reporting. We have noted the comments regarding the new language in our discussion of 4(D)(2) and, because the proposed language in Subsection 6(C)(1), the commenters' views, and our decision are the same as for 4(D)(2), we will not repeat them here.

We further added a companion provision to the definition of "serious damage prevention incident" at Section 2(S-1) that specifies that operators shall provide immediate notice to the Commission of such incidents in a manner consistent with the most recent notification procedures provided by the Commission, which are distributed on a periodic basis.

PNGTS states that it "agrees to notify the Commission at the appropriate juncture during a 'serious damage incident'" in accordance with federal safety requirements and as appropriate.[18] Such notice could include company technicians and officials, necessary emergency responders, down-stream users, and alternate suppliers. It suggests that notification be required "as soon as practicable" after matters of public safety and supply have been addressed. PWD also states that it would be most practicable to give notice to MPUC within a 12- 24 hour period, and not to require it immediately in such situations.

Notification within 12-24 hours will not achieve the intended purpose, which is to alert us when a serious damage incident has just occurred so that we are aware of it and can respond with further investigation or with information as necessary. "As soon as practicable" is subject to broad interpretation and might not result in prompt notification. Accordingly, we do not adopt PWD's and PNGTS's suggestions. We recognize, however, that there may be other more pressing safety issues that need to be addressed before notifying us. We will modify the proposed rule language to require notice immediately after all urgent safety matters are addressed.

[18] With passage of the 2003 Pipeline Safety Act, interstate pipelines are required by federal law to participate in a qualified state one-call damage prevention program. 49 U.S.C. § 60104. Accordingly, PNGTS has an obligation to notify the MPUC under Chapter 895 §6(C)'s serious damage prevention incident requirements.

Utility operators should notify us in a manner consistent with the most recent notification procedures for utility accident reporting under Chapter 130 "Safety and Accident Reporting Requirements," which we issue annually.[19] These procedures indicate primary contact names and numbers for use by electric, gas, water and telephone utilities. Sewer, cable and all other operators should contact one of our Damage Prevention Investigators. We will issue written contact information to all non-utility operators of which we are aware, and to interstate pipelines or other operators not subject to regulation by MPUC, at the first opportunity. The operator should inform the MPUC contact person that the incident is damage prevention related so that the information will be passed on to our Damage Prevention investigators.

f. Subsection 6(C)(2) Exempt small operators from annual activity report

In Docket No. 2003-672, we proposed to amend Subsection 6(C)(2) to exempt operators with less than 25 miles of underground facilities from the requirement to submit an annual activity report to the Commission. We proposed this in order to relieve small operators, the ones that are most likely to be burdened by such regulatory requirements, from this duty. We invited comment on whether 25 miles of underground facilities is an appropriate threshold for this reporting requirement.

MRWA supports an exemption for small operators from the reporting requirement but is concerned that the proposed 25-mile trigger is difficult to verify and would create administrative difficulties for small operators, as well as enforcement difficulties for MPUC. MRWA states that while many of its operators know the approximate mileage of underground facilities in their system, many are not certain of the exact mileage. MRWA recommends that the Commission adopt the more readily verifiable trigger, already employed in the law, to exempt municipalities and utilities with fewer than five full-time employees or fewer than 300 customers from the annual activity reporting requirement. We find MRWA's point persuasive and adopt its recommendation.

Additionally, MRWA comments that many operators, particularly those that are not utilities, may be unaware of the annual reporting requirement and unused to oversight by the MPUC. Although MRWA has taken steps to inform its members, it recommends that the Commission undertake additional measures to make sure all operators in the State are aware of, and understand, the section 6(C)(2) reporting requirement. MRWA notes that the list of non-member operators that the Commission is developing for its reference database would provide a

[19] Utilities should take note that the criteria for serious accident reporting under Chapter 130 of our Rules and serious damage prevention incident reporting under Chapter 895 are similar but not identical. Chapter 895 is worded to capture more incidents than is Chapter 130. However, a utility operator can accomplish both notifications to MPUC (when both are required) with one call by informing the contact that the matter is damage prevention related, along with other details of the situation.

useful tool for notifying non-member operators of the Rule's annual reporting requirements.

Our damage prevention staff has been very active in conducting training for operators and excavators throughout the state for the last three years. We have also conducted public education campaigns in an effort to alert everyone of the requirements of the law. We do not doubt, however, that there are still entities that are not sufficiently aware of the requirements of the Dig Safe law and, more particularly, Chapter 895's reporting requirement. We appreciate MRWA's comment on this matter and will integrate it into our ongoing public education efforts.

g. Subsection 6(C)(3) New underground facilities

We added this subsection in the provisionally adopted rule in Docket No. 2003-671, and now pursuant to Resolves 2003, ch 127, to establish that an operator, whether member or non-member, shall notify the Commission immediately when it installs, or newly identifies, underground facilities it is obligated to mark in a municipality in which it did not previously have underground facilities. This will allow the Commission to update its reference database as expansion of underground facilities to new municipalities occurs.

h. Subsection 6(C)4 Non-member registration

We have added this subsection in Docket No. 2003-671, pursuant to Resolves 2003, ch 127, that establishes the requirement for non-member operator registration with the MPUC.

i. Subsection 6(F) Abandoned facilities notification and mapping

In Docket No. 2003-672, we proposed to add a Section 6(F) to require operators of underground facilities to notify excavators of abandoned and inactive underground facilities in the area of an excavation of which the operator is aware and to indicate the existence of such facilities in its electronic mapping system if the operator is required to maintain such a system, as required by P.L. 2001, ch. 577, section 7.

This addition comes directly from a statutory provision and, although Section 6(F) tracks the language enacted in 2002 in 23 M.R.S.A. §3360-A (4-D), MRWA expressed concerns that it is ambiguous and needs clarification to confirm that water and wastewater systems are exempt. As written, MRWA contends, Section 6(F) would expand the requirements of Chapter 140 of the Commission's Rules (Utility Service Area and Infrastructure Maps) which are, in MRWA's view, "already excessive" and would extend its applicability to operators, such as wastewater systems, that are not currently the subject of Chapter 140.

As currently written, Section 6(F) requires “an owner or operator of underground facilities” or “the owner or operator” to undertake certain activities. The term “operator” is defined broadly in Section 2(Q) of the Rule to include water and wastewater systems. MRWA requests that we replace each of these references with “underground facility operator” which, as defined in Section 2(U), excludes water and wastewater systems. MRWA states that such an exemption is consistent with the parallel exemptions from Dig Safe System membership (Section 6(A)) and administrative penalties (Section 8) that the Legislature has enacted in recognition of the limited capabilities and resources of water and wastewater systems.

We disagree with MRWA's proposed interpretation. As noted by MRWA, “underground facilities” and "operator" are defined broadly in the statute to include water and wastewater systems, whereas "underground facility operator" excludes water and wastewater systems.[20] With these terms so defined, the statute distinguishes between provisions that are applicable to all owners and operators of underground facilities and those that exclude water and wastewater systems.

We find the current statutory language, and that of the proposed rule, in harmony with the purpose of the Dig Safe law and decline to read MRWA's limitation into the language. The use by the Legislature of the term “owner or operator of underground facilities” in Subsection 4-D is logically consistent with the law’s broad definitions of "operator" and “underground facilities.” That is, it is logical that the Legislature meant to include water and wastewater systems in the requirement for operators to indicate to excavators the existence of abandoned or inactive facilities in the excavation area so that excavators can proceed with caution to avoid damage to such facilities. While perhaps not as great a risk to the excavator as the hazard created by damage to electric and gas facilities, damage to water and wastewater facilities creates a risk to public health and a risk of service interruption, as well as unnecessary costs to the users of the facility. Nor do we read Subsection 4-D to impose electronic mapping on any entity beyond those required to under Chapter 140. Rather, it clearly contains different directives for entities that do not have electronic mapping than it does for those that do. From its construction, then, we see no ambiguity or expansion of responsibilities to water and wastewater systems. Those that are not required under Chapter 140 to implement electronic mapping need not do so as a result of this new

[20] “’Underground facility’ means any item of personal property buried or placed below ground for use in connection with the storage or conveyance of water, sewage, electronic, telephonic or telegraphic communications, electric energy, oil, gas or other substances and including, but not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, appurtenances and those parts of poles below ground,” but not highway drainage culverts or under drains. 23 M.R.S.A. § 3360-A(1)(E). "Underground facility operator" is defined in 23 M.R.S.A. §3360-A(1)(F) more narrowly to exclude water and wastewater systems as “the owner or operator of any underground facility….used in furnishing electric, telephone, telegraph, gas, petroleum transportation or cable television service.”

legislative provision but are required to "notify the excavator if the operator is aware of abandoned or inactive facilities in the area of an excavation," fulfilling the damage prevention purpose of this provision.[21] Moreover, it is our view that had the Legislature intended to exclude water and wastewater systems from these requirements, it would have simply used the term "underground facility operators" established in the law.

We do not, therefore, find it necessary to make the changes in Section 6(F) proposed by MRWA. We think the applicability of Subsection 6(F)(2) would be clearer, however, if it were restated as follows:

> If an owner or operator of an underground facility is not required to maintain an electronic mapping system under Chapter 140 of the Commission's rules, the owner or operator shall notify an excavator of any abandoned or inactive facilities in the area of a proposed excavation of which it is aware. An operator shall be conclusively presumed to be aware of any facilities abandoned after March 28, 2002.

We adopt this language for Subsection 6(F)(2) and Subsection 6(F)(1) and (3) as proposed in the renoticed proposed rule.

Section 7: Commission Activities

a. Section 7(A-1) Reference Database

We add this section in Docket No. 2003-671, pursuant to Resolves 2003, ch 127, to establish that the Commission shall develop and maintain a database for excavator reference listing the non-member operators that have registered the municipalities in which they have underground facilities with the MPUC. Beginning May 1, 2005, the Commission will make this database available to excavators by telephone and Internet or other reasonable means and will update the database upon notification by operators of the presence of underground facilities in a municipality.

b. Subsections 7(B)(2)(a) and (b) Option of informal review or written reply

In Docket No. 2003-672, we proposed to amend Subsections 7(B)(2)(a) and (b) to provide flexibility to the assigned staff investigator to waive the informal conference when the respondent does not request, and the investigator does not feel the need for, an informal conference. The amendment also provides for the informal review to consist of an informal review, analysis of the

[21] MRWA members should also consider that the Dig Safe law's damage prevention goals include avoiding loss of service, environmental hazards, and unnecessary repair costs for ratepayers.

respondent's written reply to a Notice of Possible Violation, or both. The current language can be read to rigidly require both even if neither the respondent nor the investigator wish to proceed in that manner.

PWD does not object to this provision. MRWA takes no position on it. We find it to be a useful clarification and adopt it.

c. Subsection 7(B)(2)(d)(3) Require witness to attend informal conference

We proposed, in Docket No. 2003-672, to amend Subsection 7(B)(2)(d)(3) to allow the Commission to require persons with relevant information about a damage prevention incident to attend the informal conference and/or to provide documentation or other evidence for use in the investigation. This is necessary because persons with first-hand knowledge of the incident, such as persons who were present at the job site around the time of the incident, are frequently necessary to evaluate whether a suspected violation has occurred. While their actions are not the focus of the investigation, their observations are often valuable in determining what occurred.

PNGTS and Associated Constructors commented that while they appreciate the need for persons with relevant information about an incident to attend the informal conference, they were not comfortable that this provision would empower the MPUC to require any person that might have information to attend the informal conference. Associated Constructors noted that this provision would force them to pull equipment operators off a project to attend, impeding productivity and costing the excavator money. Associated Constructors suggests that excavators would prefer to have foremen or superintendents attend the conference and PNGTS suggests that a written statement should be acceptable. Associated Constructors concluded that it prefers that the Commission not require field persons, rather than supervisors, to attend informal conferences unless there is a real need to have them attend. PWD does not object to this provision and MRWA takes no position on it.

We understand the productivity concerns and are confident that our investigators will weigh that consideration in any decision to require field equipment operators or other personnel to attend the informal conference. We note, however, that accurate information is critical to our statutory obligation to effectively enforce the Dig Safe law and is the means by which we determine whether a violation has occurred. We will endeavor to strike an appropriate balance between these competing goals. Therefore, we adopt this provision as proposed.

d. Subsection 7(B)(4)(a) Statement of issues for adjudication

We proposed, in Docket No. 2003-672, to amend Subsection 7(B)(4)(a) to require that a respondent requesting an adjudicatory hearing indicate the findings or conclusions with which the respondent disagrees and provide the respondent's position thereon. This information will increase the efficiency of the

adjudication by providing a focus for the hearing, allowing parties to better address the respondent's concerns.

PWD does not object to the proposed modification. We received no other comments on this proposal. We adopt this amendment.

8. Section 8: Administrative Penalties

a. Subsection 8(C)(5) Penalty for excavator failure to follow exemption procedures

We proposed, in Docket No. 2003-672, to satisfy P.L. 2001, ch. 577, section 11, by indicating in the order adopting the final amendments to Chapter 895 that the Commission may impose an administrative penalty for the failure of an excavator to follow the exemption procedures provided in 23 M.R.S.A. §3360-A (5-C), (5-D) and (5-E). Any excavator that fails to comply with the exemption requirements in the law will be held to the standard excavator requirements. We proposed not to add the explicit statutory language appearing at P.L. 2001, ch. 577, section 11 to the rule's list of violations for which the Commission may impose an administrative penalty appearing in Section 8(C) and to rely instead on finding a violation of the normal notice provisions in cases where the provisions for an exemption are not met. We also invited comment on whether, as a policy or enforcement matter, it would be preferable to attach the penalty to the specific requirements of the exemptions themselves, rather than to the underlying provisions of the law for which the excavator would otherwise be held accountable in the event the excavator failed to satisfy the requirements for an exemption. We received comment on this proposal from TAM and PWD.

PWD agrees that the Commission should adopt language to facilitate the imposition of administrative penalties for the failure of excavators to follow exemption procedures and states that:

> attaching the penalty to specific requirements of the exemptions will assist in clarifying the administrative process and reduce the legal ambiguity of applying the penalties to the underlying law.

TAM commented that having the Rule mirror the statutory language is most appropriate and preferable given that the statutory language is ultimately controlling.

Given that the majority of commenters believe that it is important to include the law's directive in our rule as specifically as possible, we will add Subsection 8(C)(5) to the Rule to make clear that administrative penalties may be imposed for failure to comply with exemption provisions, as follows:

5. Failure of excavator to comply with the exemption requirements and procedures of Sections 4(F)(1), (2), and (3).[22]

b. Section 8(E) Modify headings to reflect statute

We proposed in Docket No. 2003-672 to modify the headings in Section 8(E) because they may create confusion and appear to be inconsistent with the statute. The Legislature imposed a maximum penalty of $500 for any violation of the damage prevention law, except that if the person has been found in violation within the prior 12 months the administrative penalty may not exceed $5,000 for a violation. The headings, “single violation” and “multiple violations,” were intended to summarize the sequential application of the maximum penalty levels. However, our experience has shown that multiple violations of the law often occur within any given incident, whether it is the alleged violator’s initial incident or a subsequent incident. We proposed to replace the current headings with "First incident" and "Subsequent incidents" to clarify the maximum penalty level for violations that occur during initial or subsequent incidents, with an initial incident having a maximum penalty of $500 per violation and violations that occur in subsequent incidents within 12 months of a finding of prior violations having a maximum penalty of $5,000 per violation, consistent with 23 M.R.S.A. § 3360-A (6-C).[23]

IV. OTHER ISSUES

A. Fiscal Impact

In accordance with 5 M.R.S.A. § 8057-A (1), we invited comment on the fiscal impact of the proposed rule and our expectation that it would be minimal. The Commission received no comments on the fiscal impact of this rule.

Accordingly, we

O R D E R

1. That the attached Chapter 895, Underground Facilities Damage Prevention Requirements, is hereby finally adopted;

[22] We carry forward the limitation of this violation to excavators only as it appears in the law despite our recognition that these sections contain requirements for operators also. We will consider seeking a change in the law in the next legislative session.

[23] For consistency with our earlier decision, we incorporate the term "damage prevention" in these headings.

2. That the Administrative Director shall file this finally adopted rule and related materials with the Secretary of State; and

3. That the Administrative Director shall send copies of this Order Finally Adopting Amendments and attached proposed Rule to:

The Executive Director of the Legislative Council, 115 State House Station, Augusta, Maine 04333-0015 (20 copies).

4. That the Administrative Director shall notify the following that the Commission has adopted the attached rule:

a. All Maine underground facility owners and operators, including interstate pipelines, sewer, and cable TV operators, to the greatest extent practicable;

b. All excavators operating in Maine, to the greatest extent practicable; and

Dated at Augusta, Maine, this 25th day of June, 2004.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.